

A Conceptual Framework for the Quality of Legislation

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Lecture for the delegation of the Indonesian Ministry of Environmental Affairs, held at January 12, 2004, at Maastricht University by Gert-Jan Veerman¹.

A Conceptual Framework for the Quality of Legislation.

The content of this lecture is as follows:

1. Indicators for the Quality of Legislation in the Netherlands
2. Indicators in other bodies
3. Some comment
4. Impact of the framework
5. Final remarks

1. Indicators for the Quality of Legislation in the Netherlands

Since the fifties of the last century, a policy for the quality of legislation has been developed in the Netherlands. It started in 1951 with recommendations about especially the shape and language of the laws and other regulations. That language should be clear and crystal. That is necessary for the accessibility of laws and it possibly provides some harmony within the field of regulation. There were about 14 ministries and all of them had more or less their own legal traditions. In Holland the ministries make their own laws and other regulations.

In the eighties, when the reorganization of the Dutch civil service was, also then, under discussion, the policy of quality of legislation got an organizational component. Quality of legislation should also be promoted by organizational means: a responsible minister, some civil servants, a common commission with legal experts as representatives of the ministries. In '84 more substantial adages or maxims were formulated, to encourage that ministries would aim at less regulation. All ministries had to put their legal drafts under a 'deregulation-check' by the ministry of Justice. From 1987 this check was broadened and executed by an independent Committee (CTW). Since 1994 the policy-department for the quality of legislation is occupied with this check.

In 1991 a new element was introduced by the minister of Justice: a conceptual framework for the quality of legislation. The framework consisted of six elements.

1. Legality (conformity with (higher) law) and Realization of general principles of law
2. Effectivity and Efficiency
3. Subsidiarity and Proportionality (level of regulation, costs/profits)
4. Feasibility and Enforceability
5. Attunement with other regulations
6. Simplicity, Clarity and Accessibility

As you can see, jurists cannot count: if you count the six elements in that document of '91 you will actually find twelve elements.

And in fact the framework consists of more elements.

- A preliminary question, but related to several indicators, is that of the *necessity* of drafting a law, of a legal instrument; although you can see it as a specimen of subsidiarity.

¹ Dr. Gert-Jan Veerman has been working at the ministry of Justice (department for the quality of legislation) and is professor at Maastricht University (Law, especially Legislation and its Quality).

- Not specifically mentioned, but incorporated in the concept of law are ideas of generality and equality (laws are meant to regulate more people, in more situations, at different times) and ideas of continuity and stability. Because of legal security you must not change laws too quickly. As you perhaps know, our concept of law stems from Enlightenment, and includes the idea of self-binding of the citizens; so laws are made by the citizens themselves, for the common good, equally binding for all citizens, basis for the powers executed by their Administration, and not kept secret.

These twelve or more elements were formulated as Quality-indicators of legislation. Now, it is quite clear that most indicators are of a rather general nature. That was clear to the drafters responsible for the '91-document which contained these elements. Some clarification was given. In the afterwards set up recommendations for law-making, the Aanwijzingen voor de regelgeving- binding for the civil servants who prepare legislation²-, these indicators were a bit more elaborated.³ In general they remain rather vague and open. That is understandable: you have to find an optimum of general rules which are yet specific enough to help you when you are making a concrete law.

My colleagues of the Maastricht University⁴ did a research on the elaboration of the general quality-indicators and the more specific operationalization of these. I used much of their work in the following overview:

Quality Indicator	Specifications	Remarks
Legality	Compatible with international law Compatible with EU-law Compatible with general principles of law, like equality and legal protection Compatible with the Constitution Main clauses and provisions have to be set by a formal law Specify administrative powers Do not forget transition rules	In the process of lawmaking, this item arises when there exists already a certain idea of necessity, goal and means.
Effectivity	Formulate clear goals Determine the relation between goals and means Determine targetgroups Determine the social playing field of the intended regulation Do not forget feasibility and enforceability Involve experts	A shared definition of the problem and an adequate theory on the approach are crucial, at least in an instrumental concept of law and effectivity (but often impossible). A relation is supposed to exist between effectivity and legitimacy
Efficiency	Determine the burden of the intended law for the Administration, citizens and for trade and industry Choose the alternative with the lowest costs Predict desirable and undesirable effects	Involve experts and the executive powers Use the Environmental Effect Test (MET) and the Business Effect Test (BET) Notify the administrative costs

² Only for them, the Aanwijzingen don't have a legal status in the sense that you can invoke them e.g. in court.

³ Besides, this document contains a lot of handy and practice instructions when drafting a law.

⁴ S. Klosse, M. Peeters, S. Ubachs, L. Verheij (ed.), Op zoek naar kwaliteit (in search of quality), Sdu, 2003

		(ACTAL).
Feasibility or Practicability	Determine the executive bodies and Their powers Determine the relation to other bodies Confine/ limit the amount of moments for decision, also with an eye on legal remedies Adjust time for implementation Consider provisions for control Involve the executive powers	
Enforceability	Formulate as simple and unambiguous as possible Avoid exeptions Choose out of different methods and their legal basis Involve the Law-Enforcement powers, like police and public prosecution	Do not forget the possibilities of factual control. Use the Compliance-Test (the so-called T11).
Subsidiarity and proportionality	Give room to selfregulation Study whether existing laws can be used Study whether instruments different from legislation can be used for attaining the goal Explicate the necessity of the regulation Put administrative tasks and powers on a level as low as possible	Subsidiarity includes that Government is as restricted as possible in imposing a law The Supreme Court granted compensation for unproportional burdens
Attunement	Think of side-effects Think of other rules on the same object Think of comparable, concurring rules Do not deviate in specific laws from general rules and laws	Notice that rules will operate in a semi-autonomous social field with concurring rules; effectivity and feasibility are related to this issue.
Simplicity, Clarity and Accessibility	Explicate the regulation and the choices made	The accessibility, the publication of laws in the 'Staatsblad' is legally laid down. Nowadays legislation can be found on the internet (www.overheid.nl)

With this overview of the Quality indicators and the principles attached to the concept of law, I showed you the Dutch conceptual framework for the Quality of Law. It is a framework, not more not less. It is generally agreed that these indicators are not sharply defined from each other. They overlap, like effectivity and feasibility. They sometimes are opposite to each other. For instance. Proportionality and subsidiarity can lead to a regulation consisting of general rules, delegated powers, specific rules and even more specific powers and rules; that can be a threat to the clarity of the regulation. Besides, such a delegation of powers may increase the need for inspection, which can lead to more administrative costs. In reverse, clear rules are mostly general or simple rules which can lead to inequality and uncertainty in the execution of the regulation and therefore be a threat to legality and enforceability. Legality on one hand and effectivity or efficiency on the other, can also be strained. You can consider these indicators as means to help you to take account of essential elements in the field of rule-making.

As I said, despite their elaboration the indicators are still rather open en vague. Because it is difficult to elaborate these substantive indicators further, quality can also be obtained by certain activities during the process of law-making. Sometimes this is recommended in the Aanwijzingen voor de regelgeving. The activities can take the form of different types of ex ante evaluation or prognostic studies, consultation of experts and/ or consultation of the directly concerned people. In the Netherlands there is a lot of consultation. I would like to add: do not consult only the governors or boards, but also the people who do the jobs. These people can give more information about what a regulation will mean in practice.

2. Indicators in some other bodies

These Dutch indicators have some self-evidence. In literature and other, more official documents reference is made to such or similar indicators. The Mandelkern Group on Better Regulation, a high-level advisory group installed by the EU-Commission in 2000, mentions e.g. seven core principles for good regulation:

1. necessity,
2. proportionality,
3. subsidiarity,
4. transparency,
5. accountability,
6. accessibility and
7. simplicity.⁵

The EU-commission started an Action Plan for simplification and better regulation (COM (2001) 726 def.) on the basis of this Mandelkern-report.

The OECD launched in 1995 a checklist for regulatory decision-making, consisting of 10 questions:

1. Is the problem correctly defined
2. Is government action justified
3. Is regulation the best form of government action
4. Is there a legal basis for regulation
5. What is the appropriate level (s) of government
6. Do the benefits of regulation justify the costs
7. Is the distribution of effects across society transparent
8. Is the regulation clear, consistent, comprehensible and accessible to users
9. Have all interested parties had the opportunity to present their views
10. How will compliance be achieved.

Although these core principles and questions are not formulated in exact the same wording as the Dutch indicators, and although they pay more attention to the policy aspects and less to legal aspects, they reflect nevertheless the same ideas and considerations with respect to the preparation and drafting of a regulation.

⁵ Final report, 13-11-2001, p. i; p. 9,10

3. Some comment

I make some remarks with respect to this framework.

a. Although these indicators seem clear and are clear to some extent, their adjustment is not always easy. Even the relatively easy principle that regulations must be clear and accessible to those for who they are meant, contains in fact a big problem. In the first place you have to deal with many persons or other concerned, who have not the ability to understand every text; so a question is the level of writing: for a 12 year old schoolchild as newspapers seem to have in mind? Or do you have to keep in mind the special groups for which a law is meant: may a regulation for pharmacists be less easier than one for farmers, assumed that pharmacist have had more education than farmers? Another problem with regard to 'clarity' is that a law has to be interpreted in the context of a legal framework- a legal document is most of the time difficult to understand if you are not familiar with legal texts and with the legal framework; that is even true for pharmacists. In practice, many people don't read laws. Most people don't, I'm afraid. Laws are working via intermediate bodies, which does not mean you do not have be as clear as possible.

It is also difficult to be clear because, at least in Holland, many laws are in fact changes of existing laws. So you also must try to write your clauses in the style, system and idiom of that older law.

b. My second remark is, as I said before, that you must use this scheme as an instrument not as a unbreakable law. This scheme and the indicators mentioned in it, represent an effort to bring some technical rationality in a law-making process, that is highly political. I won't say that the political process is not rational, but it is a rationality different from 'legality' or 'effectiveness of the regulation'. For political reasons it can be very wise to produce vague rules or to choose not the most efficient solution of a problem⁶

The indicators for the quality of legislation hide in a way the different rationalities and interests that are connected with a law. Because laws reflect most of the time a compromise between several concerns and interests of different people and organizations and/ or of several rationalities⁷. The juridical and economic interests, or the juridical and political interests can differ strongly. So in general terms: legal values versus policy-values, and besides the law-technical considerations.

You also may, in this respect, observe that laws have different functions: they lay down the result of political negotiations, they are symbols of the norms and values of the ruling classes, they must be helpful to solve problems in society, they transfer a problem from the national agencies to other (governmental) bodies. The specific content and meaning of the indicators depend probably on the function you want to adjust to a specific law.

In this respect, our experience in Holland, where we have juridical specialists for drafting bills, is that often there exists a tension between the juridical educated drafters of a bill and their colleagues of the policy- and/ or financial departments within a ministry. That is also true for our ministry of Environmental Affairs. Both categories of civil servants stand for legitimate values, but they are not necessarily in harmony. In other countries drafters and

⁶ It is even possible that a compromise about the content of a law is part of a broader negotiation between political actors, or of a package-deal and has in fact little to do with the content of the law itself.

⁷ Snellen mentions the economic, financial, legal, technical (the solution of the problem) and political rationalities; these rationalities are autonomous conceptual fields.

policymakers are not organized in separate departments; I guess the problem is the same but figures more inside, within the mind of the drafting policy-makers.

These often opposing interests, functions and rationalities also mean that, although it is necessary to consult the people and institutions concerned, the consultation of the public will possibly not lead to a regulation which will please all of them. Mostly, there are people who have 'to pay' for the solution. It may be possible to formulate a compromise. But that often means an open and general clause or a very very specified regulation. Both have their side-effects. Sometimes, government has to choose.

c. Thirdly, a major problem is that developing a policy and drafting a regulation accompanying that policy, are largely based on expectations, expectations about how the arrangement and measures will work. Mostly, the solutions are sold as the best solution, the one and only way to solve the problem, but in fact it is a question of hope and prayer. Making law and policy is 'governing in the mist', as the Dutch scholar Scheltema once said. Policy-making is in fact often strongly a case of experiment.

In Holland we have a mechanism within the civil service that when necessary, some impact-analyses have to be executed. You find them in the overview. I think that this practice started in the field of environmental law. Prognostic studies or impact-assessments were structurally build in the legislative and decision-making process. These tests don't guarantee certainty or the truth about the effects of a intended regulation either. I remember that American research in the seventies revealed that the prognoses mostly were not very correct- the most important thing was that much attention was paid to the subject 'environment'.

d. Fourthly, one could state that the most important aspect of the quality of a law exists in fact outside that law: the *implementation* of the law and the policy formulated therein. That means that money, time, personnel, skills, priorities and so on within the executive powers and other also private institutions, are safeguarded.

e. Finally: keep in mind that no rule can be perfect. There are too many people involved in too many roles and with too many concerns. There is a time gap between preparation and operating of the law, a law is rather digital and it will operate in a analogue reality. Besides, a rule does not land in a social vacuum but it must find its way in a semi-autonomous social field (Sally Moore), and has, so to say, to compete with existing rules and power-relations in that field. You may not expect that your bill will work as intended. People work with it, or against it.

4. Has the framework any impact?

There does not exist much research-based knowledge about the use and effects of the conceptual framework. What exists is this. In the earlier mentioned research of my Maastricht-colleagues it appeared, although it was not the main question, that attention had been paid to several aspects of the conceptual framework. But a –small- research to the way in which this framework played a role in the thinking and operating of legislative civil servants, revealed that they do not think systematically of the framework. They use it when it suits them.

In my observation, the conceptual framework is a factor for furthering the quality of legislation. It provides a clue for judging the quality of draft bills. The Indicators ask for

attention to be paid to different aspects, ask for consideration and discussion. In my work I can notice that the check by the ministry of Justice leads to discussions between the colleagues about the content and the wording of the draft bills and to real changes in text or explanation. When they cannot come to agreement, the problem can be raised to the ministers concerned or even to the Council of Ministers. That happens. It depends on the mutual relations within the Council and the authority of the minister of Justice how often and how much he can influence the legislation of his colleagues. The minister of Justice has, of course, a delicate position: he has his responsibility for the quality of Dutch legislation, but therefore he has to enter the substantial field, the responsibilities and powers of his fellow ministers; so he shall only intervene in important matters and not too often. This has an effect on the negotiations between the civil servants. Although the ministry of Justice will not win always, its civil servants have some influence. Possibly plays a role that after the decision in the Council of Ministers about a draft-bill, the Council of State gives an advisory opinion on that draft, an opinion that has to be made public.⁸

The Indicators make sense. The existence of the framework provides civil servants an official support to invoke the quality-indicators and protect the several rationalities and interests, and raises therefore the chance that regulation will be better. But in the end, the political rationality wins, and that is what we wanted.

5. Final remark

Indonesia consists of many islands and regions and, as I understood, there is a policy of decentralization, also in the field of environmental law. In terms of our Indicators you try to come up to subsidiarity and proportionality. It also can contribute to some effectivity and feasibility. On the other hand, there are risks in terms of clarity, equality, enforceability and control.

It is awful. Laws have a paradoxical connotation.

Laws are made to give security and clarity in human relations. It limits freedom, but because of that it also provides freedom.

When room is given and rules are aimed at the own responsibility of people and institutions, the complaint is that the rules are too open and you don't know what to do; when justice is done to the specific situations in reality, the complaint is that rules are too precise and don't give any room for people's own, inventive behaviour.

The goal and profit of a law often is the common good, the costs are often laid down at particular subjects- they complain. What is security for one, can be a burden for another.

And finally, the political field in which a law is made, differ strongly from the social field in which the same law is operating; the same law consists, so to say, at least of two different laws.

One will never make the perfect law.

⁸ The Council of State uses more or less the same criteria as the mentioned Indicators.